



POLICE DEPARTMENT

September 24, 2008

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Ronald Burke
Tax Registry No. 933662
Facilities Management Division
Disciplinary Case No. 83440/07

The above-named member of the Department appeared before me on June 4, 2008, charged with the following:

1. Said Police Officer Burke, while assigned to PSA 1, while off-duty, on or about May 11, 2007, at a location known to the Department, in Kings County, engaged in a physical altercation with an individual known to the Department. (*As amended*)

P.G. 203-10, Page 1, Paragraph -- PROHIBITED CONDUCT

The Department was represented by Krishna O'Neal, Esq. Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDIntroduction

It is not disputed that on May 11, 2007, the Respondent resided with his long-time girlfriend Zovania Brenes and their [REDACTED] in [REDACTED] [REDACTED] who was four-months-old at the time, suffers from asthma.

The Department's Case

The Department called Sergeant Gordon Fraser and Lieutenant William Gough as witnesses and offered the statement of Zovania Brenes.¹

Sergeant Gordon Fraser

Sergeant Fraser testified that he was assigned as the 88 Precinct patrol supervisor when at about 0230 hours he and his driver, Police Officer Julio Colon, responded to a radio transmission that a dispute involving an off duty member of the service (MOS) had occurred in [REDACTED]. When they arrived at [REDACTED], they observed the Respondent in front of the building. He identified himself as an MOS and told Fraser that he and Brenes had argued about the medical care of their son [REDACTED]. Fraser interviewed Brenes who told him that the Respondent had pushed her onto their bed and slapped her in the face. Fraser testified that, "I think that she was trying to take the child to the hospital."

¹ The Assistant Department Advocate (hereinafter: "Advocate") stated that she sent letters to Zovania Brenes in March, 2008. When she received no response to the letters, the Advocate sent an investigator to apartment [REDACTED]. The investigator ascertained that Brenes had moved to the Bronx. On May 6, 2008, the Advocate spoke to Brenes on the telephone. Brenes told the Advocate that she was no longer involved with the Respondent and that she would not appear in the Trial Room to testify.

On cross-examination, Fraser recalled that Brenes told him that [REDACTED] was breathing normally, considering that he has asthma, and that he was fine. Brenes also told him that the Respondent "was over-reacting" to [REDACTED] labored breathing. Fraser observed no injuries to Brenes. Fraser did not look at the Respondent's arms or ask him if he had suffered any injury.

Lieutenant William Gough

Lieutenant Gough, who is assigned to the Brooklyn North Investigations Unit, testified that on the night this incident took place, he and Sergeant Victor Steele conducted a tape-recorded interview of Brenes (Department Exhibit 1) in which Brenes stated that when she arrived home from work, the Respondent mentioned to her that [REDACTED] didn't seem to be feeling well because he had been fussy and irritable the entire day. He informed her that [REDACTED] had not slept because he was not feeling well. She told him that [REDACTED] had a cough and they might need to take him to the doctor. She kept on checking on [REDACTED] and while she was feeding him she listened to his chest. He was wheezing and "retracting" which she recognized as a symptom of asthma.

When she told him that they needed to take [REDACTED] to the hospital, the Respondent told her that [REDACTED] would be fine. She got upset and told him that they could not wait until morning to "see if something happens to him." He "got very nasty" and he told her to "call EMS for that foolishness and he basically made it seem like I was overreacting and I didn't know what I was talking about." She told him, "Fine, if you're not taking him, then I'm taking a cab and I'm taking him. But I'm telling you now if they admit him, I don't want to see you over there."

She went into the bedroom to dress [REDACTED] She "grabbed the house phone to call 411" because she need to get a telephone number for a cab company. He snatched it from her and told her to use her cell phone. She then went downstairs, where the Respondent's father lives, and asked his father if he had a telephone number for a cab company. While she was there, the Respondent came down and "just started being very nasty." He told her, "Get upstairs now!"

She came back upstairs to get [REDACTED] ready to go to the hospital. She called 411 and got a telephone number for a taxi company. As she was "going to go get ready" to leave with [REDACTED] the Respondent came back upstairs, came into the bedroom and "started grabbing" [REDACTED] who was inside his crib. She then "tried to take [REDACTED] because she "didn't know if he was going to take him to the hospital or what. I just saw that he was taking him and [REDACTED] wasn't dressed or anything. He shoved me down onto the bed. So then I kept getting back up and I kept trying to take [REDACTED] from the crib and he wouldn't let me, he just kept shoving me harder and harder and then, at one point, he wrestled me to the bed. I started to hit him back. I remember I hit him on the chest and then, at one point, I remember he just pulled my leg and he pulled me right down off the bed." She felt a "smack" and "then he took [REDACTED] and he took off with him" and left the apartment.

Since she "didn't know where he was," she began calling nearby hospitals and "tracked him down at some [REDACTED] College and once I called there they told me [REDACTED] was there and then I called them back a while later to ask them how [REDACTED] was doing but they didn't want to give me much information." She called the Respondent on his cell phone and "he told me they had taken x-rays" of [REDACTED] She asked him

questions about "medicine" and "what exactly" the medical personnel had told him but "he was giving me a hard time" and he told her, "I don't want to talk to you anymore...I'll tell you when I get home. I'm here with him." He then told her that he was going to turn off his cell phone.

When she was asked, "Did you sustain any injuries?" She answered, "My arm hurt a little afterwards." When she was asked, "Did he push you with two hands?" She answered, "Yeah with his hands." She stated that when she saw that he was taking [REDACTED] she "became alarmed" because he "went to go grab" [REDACTED] so she "went to grab the baby" first "before he took him." When she was asked, "At what point did he push you?" She responded, "He pushed me when I went to grab the baby, then he shoved me onto the bed and then I got back up."

She was asked to describe what took place between the point in time when the Respondent arrived back at the residence with [REDACTED] until she called 911. She stated that "as soon as he steps in the door and he came into the bedroom...I asked him to give me the baby, but he just went about putting him in the crib." She "asked him what the doctor's say and he didn't answer me." She "was just trying to keep calm." She repeated "Honey, what did the doctors say?" He "wouldn't answer me and I asked him again." He told her "wait" or "something like that."

She stated that "about five minutes" after the Respondent arrived home with [REDACTED] she called 911, "because I wanted to know what was wrong" with [REDACTED] and she had already "asked him a few times." She was asked "Is it fair to say if he would have cooperated with you and given you the answers that you might not have called 911? Or is it that you were calling 911, in your mind, you were calling 911 the entire time?" She

asserted that she had planned to call 911 the entire time the Respondent was gone with [REDACTED] but that she had not done so because she was focused on determining their whereabouts.

On cross-examination, Lieutenant Gough testified that he had asked Brenes, "Is it fair to say if he would have cooperated with you and given you the answers that you might not have called 911?" because it appeared to him that Brenes had called 911 only because she was angry at the Respondent because when he returned home with [REDACTED] he did not tell her what had transpired at the hospital. He also asked Brenes why she had delayed telephoning 911 for four to six hours after the point in time she claimed the Respondent had pushed her, shoved her down onto the bed, slapped her and then left the residence. Lieutenant Gough testified that he was not satisfied with her explanation that her reporting delay was solely the result of her concern for her son's whereabouts.

Lieutenant Gough testified that the SPRINT report documenting Brenes' call to 911 reflects that the call was placed at 0235 hours, that Brenes told the operator that she was the victim of an "assault in progress," that Brenes also asserted to the 911 operator that the Respondent was "trying to take my son," and that Brenes further told the 911 operator the Respondent was "armed." Lieutenant Gough testified that based on his investigation and based on Brenes' statement to him that she did not call 911 until after the Respondent had returned home from the hospital with [REDACTED] Brenes assertions to the 911 operator, other than that the Respondent was armed, were inaccurate and had resulted in an inaccurate SPRINT report.

He observed no injuries to Brenes. He saw scratch marks on both of the Respondent's forearms.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent testified that when Brenes arrived home from work, he told her that [REDACTED] was not feeling well and that [REDACTED] had not slept and that he was coughing and having trouble breathing. She told him that [REDACTED] would be fine and that he was overreacting to [REDACTED] normal asthma symptoms. Since the local hospital was only ten blocks from their residence, he decided to take [REDACTED] to the emergency room. The Respondent denied that he had shoved Brenes onto a bed or that he had slapped Brenes in the face. He testified that Brenes tried to prevent him from getting into his car with [REDACTED]. She grabbed both of his forearms and dug her fingernails into them, causing scratches, as he was holding [REDACTED] and trying to enter the car to drive him to the hospital, he "shoved her away" from him. Because he wanted to get away from her as quickly as possible, he drove off holding [REDACTED] in one arm and steering the car with his other arm. He took [REDACTED] to the hospital where he was examined by a doctor.

On cross-examination, the Respondent was confronted with a statement he made at his official Department interview that he "might have hit" Brenes. He testified that if he struck Brenes as he shoved her away from him, he had only done so only in self-defense because she would not stop scratching his arms and would not allow him to get into the car holding [REDACTED].

FINDINGS AND ANALYSIS

The Assistant Department Advocate (hereinafter: "Advocate") asserted that the Respondent engaged in a physical altercation with Brenes because he initiated inappropriate physical contact by pushing her and slapping her in the face as she was trying to take their son [REDACTED] out of their residence so that she could bring him to a doctor (Transcript p. 112). However, the Respondent asserted that it was Brenes who was the physical aggressor and who initiated physical contact by grabbing his arms and scratching them as he was placing [REDACTED] in the car to drive him to the hospital, and that the only physical contact he engaged in was to "shove her away" from him solely as an act of self defense to prevent her from continuing to scratch his arms.

I find the Respondent not guilty because the Department failed to meet its burden of proving by a preponderance of the credible evidence that Brenes' version of this event is more believable than the Respondent's version.

Brenes' version of this event, which was offered as hearsay evidence at this trial, must be examined in light of the inconsistency between her claim in her statement that the Respondent had pushed her and slapped her in the face because she wanted to take [REDACTED] to a doctor and Sergeant Fraser's testimony that Brenes told him that the Respondent's action of driving [REDACTED] to the hospital constituted an overreaction to [REDACTED] asthmatic, labored breathing and that [REDACTED] "was fine."

Brenes' hearsay claims must also be examined in light of the fact that she delayed telephoning 911 until four to six hours after this event. Despite this reporting delay, the SPRINT report documenting her call to 911 reflects that she told the operator that she was the victim of an "assault in progress." Brenes also asserted to the 911 operator that

the Respondent was “trying to take my son,” even though Brenes admitted to Lieutenant Gough that she did not call 911 until after the Respondent had returned home from the hospital with [REDACTED]. It is clear that Brenes’ interviewers strongly suspected that the real reason she called 911 five minutes after the Respondent arrived home with [REDACTED] was because she became angry at the Respondent when he did not immediately answer her questions about [REDACTED] examination and treatment at the hospital. This suspicion is reflected by Lieutenant Gough’s question to Brenes, “Is it fair to say if he would have cooperated with you and given you the answers that you might not have called 911?”

Appellate decisions have consistently held that although hearsay is admissible in administrative proceedings and although a disciplinary finding of guilty may rest upon uncorroborated hearsay alone, hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility² and that the more central the hearsay is to the agency’s case, the more serious the question of basic fairness and the more critical the question of reliability may become,³ because, as is the case here, the complainant’s failure to testify makes it impossible to observe testimonial demeanor and assess the credibility of an account that has been tested under cross-examination.

Here, Brenes’ failure to testify prevented Respondent’s counsel from having the opportunity to question Brenes regarding the inconsistency in her statements, regarding why she delayed four to six hours before calling 911, and regarding why she told the 911 operator that there was an “assault in progress” and that the Respondent was “trying to

² People Ex. Rel Vega v. Smith, 66 N.Y.2d 130 (1982); Eppler v. Van Alstyne, 93 A.D.2d 930 (3rd Dep’t. 1983).

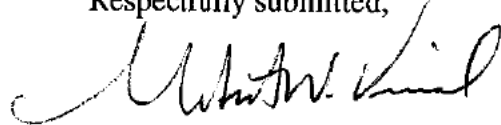
³ Calhoun v. Bailar, 626 F. 2d 145 (9th Cir.1980), cert. denied, 452 U.S. 906 (1981).

take my son" when the Respondent had already arrived home from the hospital with [REDACTED]

Finally, the Respondent's version of this event is supported by the undisputed fact that he was the parent who brought [REDACTED] to the hospital. Moreover, his testimony that Brenes grabbed his arms and dug her nails into them as he was putting [REDACTED] into his car is corroborated by the scratch marks that Lieutenant Gough observed on his arms. The mere fact that the Respondent acknowledged that he "might have hit" Brenes in self defense to force her to let go of his arms, does not, contrary to the Advocate's assertion, constitute an admission to having voluntarily engaged in a physical altercation and does not, without more, rise to the level of actionable misconduct.

Based on the above, the Respondent is found Not Guilty.

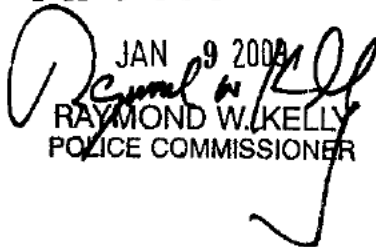
Respectfully submitted,



[REDACTED] W. Vinal

Assistant Deputy Commissioner – Trials

APPROVED

JAN 9 2008

RAYMOND W. KELLY
POLICE COMMISSIONER